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Supreme Court, U.S.

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In the Supreme Court of the United States
OCTOBER TERM, 1989

HENRY VANCE, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in admitting, under Fed. R. Evid. 404(b), evidence of prior misconduct by petitioner that showed his motive to commit the crime for which he was convicted.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 871 F.2d 572. The opinion of the district court ruling on the government's motion in limine (Pet. App. 15a-29a) and the opinion of the district court denying petitioner's motion for a new trial (Pet. App. 30a-41a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1989. A petition for rehearing was denied on June 6, 1989. Pet. App. 42a. The petition for a

writ of certiorari was filed on August 3, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted on one count of conspiracy to transport a firearm in interstate commerce with the knowledge that it was to be used to commit murder, in violation of 18 U.S.C. 371, and on one count of transporting a firearm in interstate commerce with the knowledge that it was to be used to commit murder, in violation of 18 U.S.C. 924(b). He was sentenced to an aggregate term of 15 years' imprisonment. The court of appeals affirmed. Pet. App. 1a-14a.

1. The evidence at trial, the sufficiency of which is not in dispute, is recounted in the government's brief in the court of appeals. It showed that petitioner participated in a plot that resulted in the murder of the Florida state prosecutor who obtained the conviction of petitioner's long-time friend, Mike Kelly, on drug charges. After Mike Kelly's conviction, his wife, Bonnie Kelly, enlisted petitioner's aid in murdering the prosecutor. Petitioner initially agreed to have the prosecutor murdered in return for \$35,000, but he later backed out of that plan and returned Bonnie Kelly's down payment. After Bonnie Kelly told petitioner that she planned to murder the prosecutor herself, petitioner provided her with a gun that he said could not be traced. Petitioner also told Bonnie Kelly how to commit the murder and gave her instructions on how to dispose of the gun. On January 16, 1982, Bonnie Kelly murdered the prosecutor at his home in Florida. Petitioner agreed to provide a false alibi for Bonnie Kelly and later told the au-

thorities that he had seen her in Kentucky at the time of the murder. Gov't C.A. Br. 5-8.

Prior to trial, the government filed a motion in limine seeking the admission of evidence showing nine instances of prior misconduct by petitioner. Six of the acts involved prior criminal activity by petitioner and one or both of the Kellys. Pet. App. 3a. The government offered this evidence to explain why petitioner, a former aide to the Governor of Kentucky and to the Speaker of the Kentucky House of Representatives, would supply Bonnie Kelly with a weapon to commit a murder. The district court found that the evidence relating to the six instances of petitioner's prior criminal involvement with the Kellys "is probative on the issue of *motivation* in the transfer of the pistol." Pet. App. 37a. It acknowledged that the evidence would be prejudicial to the defense, but concluded that it would not be unfairly prejudicial, and ruled that the evidence was not rendered inadmissible by Fed. R. Evid. 404(b). Pet. App. 37a.¹ The court excluded evidence of the three prior acts that did not involve the Kellys because it concluded that they were irrelevant or that the prejudicial effect of that evidence outweighed its probative value. *Id.* at 38a-39a.

¹ Specifically, the district court admitted evidence showing that (1) petitioner and Bonnie Kelly created fake LSD to replace real LSD that petitioner had stolen from a sheriff's office; (2) petitioner stole a machine gun and gave it to Mike Kelly for safekeeping; (3) petitioner, the Kellys, and another man set off a bomb in the front yard of a county judge; (4) petitioner and Mike Kelly stole a machine gun from a police impoundment lot; (5) petitioner and Mike Kelly illegally manufactured silencer parts and altered weapons; and (6) Mike Kelly produced false identification papers for petitioner. Pet. App. 40a.

After his conviction, petitioner filed a motion for a new trial on the ground that the prior misconduct evidence had been improperly admitted. In its order denying the motion, the court noted that "counsel for the defendant strenuously argued in his closing that [petitioner] had *no motive* for giving Bonnie Kelly a gun." Pet. App. 21a. The court again concluded, contrary to petitioner's contention, that the challenged evidence "went directly to the issue of [petitioner's] motive in supplying a gun to Bonnie Kelly." *Id.* at 22a.

2. The court of appeals likewise rejected petitioner's claim that the evidence of his prior misconduct should not have been admitted. The court held that "the prior bad acts evidence was probative of [petitioner's] motive, a permissible purpose for admission of evidence under Rule 404(b) and a material issue in the case." Pet. App. 7a. The court explained that by showing petitioner's prior criminal involvement with the Kellys, the evidence suggested that petitioner "might have been motivated to do all he could to assist the Kellys, including assisting Bonnie Kelly in the murder of the prosecutor of Mike Kelly." *Id.* at 8a. In addition, the court of appeals held that the probative value of the evidence outweighed its prejudicial effect, and it noted that the district court had excluded evidence that did not tie petitioner to the Kellys. *Id.* at 8a-9a. Judge Gibson dissented because he concluded that the prior misconduct evidence did not establish that petitioner had a motive to help Bonnie Kelly murder her husband's prosecutor. *Id.* at 12a-14a.

ARGUMENT

1. Petitioner renews his claim (Pet. 8-12) that the district court erred by admitting the evidence of his prior misconduct with the Kellys. Petitioner maintains that the prior misconduct evidence did not show that he had a motive for providing Bonnie Kelly with a weapon to commit the murder. Instead, he claims, the evidence was admitted to show that petitioner possessed a poor character in spite of his social and political prominence. This fact-bound claim does not merit review.

Rule 404(b) prohibits the introduction of evidence of prior misconduct to prove the character of a person in order to show action in conformity therewith. It permits the use of such evidence for other purposes, however, such as to show a person's motive. Evidence of motive "is admitted to show that the defendant has a reason for having the requisite state of mind to do the act charged, and from this mental state it is inferred that he did commit the act." J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 404 [14] (1989). The district court and the court of appeals both concluded that the evidence of petitioner's prior criminal activity with the Kellys showed that petitioner had a reason to supply the murder weapon to Bonnie Kelly. As the district court found, "[t]he evidence went directly to the issue of [petitioner's] motive in supplying a gun to Bonnie Kelly, the wife of his friend, Mike Kelly." Pet. App. 22a.

Contrary to petitioner's contention (Pet. 10-12), the court of appeals' decision did not rest on the premise that the evidence was admitted to show that petitioner, a person of social and political prominence, actually had a bad character. Instead, the evidence served to show that, notwithstanding the improbabil-

ity that someone of petitioner's apparent prominence would assist in a murder, petitioner had a motive for supplying the pistol to Bonnie Kelly. The district court properly admitted the testimony for that purpose.

2. Petitioner also contends (Pet. 12-18) that the court of appeals' "inclusionary" approach to Rule 404(b) conflicts with the "exclusionary" approach of other courts. As an initial matter, the approach that petitioner terms "inclusionary" is the correct approach, as this Court's recent decision in *Huddleston v. United States*, 108 S. Ct. 1496 (1988), confirms. Rule 404(b) "protects against the introduction of extrinsic act evidence when that evidence is offered *solely* to prove character." 108 S. Ct. at 1500 (emphasis added). If the evidence is relevant to any other material issue in the case, it is admissible, subject to a determination that the prejudicial effect of the evidence outweighs its probative value. *Ibid.*; see Fed. R. Evid. 403. As the Court noted in *Huddleston*, "Congress was not nearly so concerned with the potential prejudicial effect of Rule 404(b) evidence as it was with ensuring that restrictions would not be placed on the admission of such evidence." 108 S. Ct. at 1501.

The cases on which petitioner relies in support of his claim that there is a conflict in the circuits were all decided before *Huddleston*. Moreover, those cases are not contrary to the decision below. In *United States v. Shackelford*, 738 F.2d 776, 782 (1984), the Seventh Circuit stated that the prior misconduct evidence at issue "would be admissible if it helped to establish that defendant committed the crime by giving defendant a motive," as the courts below held. The court in *Shackelford*, however, found that motive was

not at issue in that case. In this case, by contrast, motive was plainly at issue, as petitioner's closing argument shows. See Pet. App. 8a. Petitioner's claim that this case conflicts with *Shackleford* is thus based on his purely factual contention that the evidence at issue here did not tend to show that he had a motive to aid in the murder of Mike Kelly's prosecutor.

Nor is the Seventh Circuit's decision in *United States v. Beasley*, 809 F.2d 1273 (1987), contrary to the decision here. In *Beasley* the government sought to introduce evidence of prior bad acts to establish a "pattern" of misconduct. The court noted, however, that evidence may not be introduced to show a "pattern" of misconduct where the prosecution asks the jury to infer from that "pattern" that the defendant must have also committed the discrete act charged in the indictment. "The inference from 'pattern' by itself is *exactly* the forbidden inference that one who violated the drug laws on one occasion must have violated them on the occasion charged in the indictment. Unless something more than a pattern and temporal proximity is required, the fundamental rule is gone." *Id.* at 1278. In addition, the court concluded, "[t]he record in this case does not show that the district judge took into account the power of this bad act evidence to impugn [the defendant's] character." *Id.* at 1279. Here, by-contrast, both the district court and the court of appeals found that the evidence was admissible for a purpose other than to impugn petitioner's character, and both courts found that the probative value of the evidence that was admitted outweighed its prejudicial effect. Pet. App. 8a-9a, 37a.

Finally, the decision in *United States v. Foskey*, 636 F.2d 517 (D.C. Cir. 1980), does not conflict with

the decision here. The District of Columbia Circuit there stated that "evidence of a defendant's prior 'bad acts' is excluded when its sole tendency is to prove that the defendant is a person of bad character and thus predisposed to commit the crime for which he is on trial." *Id.* at 523. That standard is entirely in accordance with the standard applied by the court below. The court concluded in *Foskey* that the prior misconduct evidence that was admitted there to show intent did not do so. Having concluded that the evidence "was not relevant to any issue in the case," the court further concluded that it "was extremely prejudicial because it tended to prove only the defendant's criminal predisposition." *Id.* at 526. The courts below reached a different conclusion, not because of any disagreement about the interpretation of Rule 404(b), but because those courts found the evidence of petitioner's criminal relationship with the Kellys probative as to petitioner's motive, a disputed issue here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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